UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

NATIONAL ASSOCIATION OF IMMIGRATION JUDGES, AFFILIATED WITH THE INTERNATIONAL FEDERATION OF PROFESSIONAL AND TECHNICAL ENGINEERS,	)	Civil Action No. 1:20-cv-731
Plaintiff,	)	Court of Appeals No. 20-1868
v.	)	July 31, 2020 10:00 a.m.
JAMES R. McHENRY, III,	)	
Defendant.	)	

TRANSCRIPT OF MOTION HEARING PROCEEDINGS
(Via Teleconference)
BEFORE THE HONORABLE LIAM O'GRADY,
UNITED STATES DISTRICT COURT JUDGE

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MORNING SESSION, JULY 31, 2020

(10:00 a.m.)

THE COURT: Good morning. This is Liam O'Grady. Good morning to all, and I hope everyone is safe today, and I appreciate your making time available for this oral argument this morning.

As we all know, the plaintiff, NAIJ, has just filed a motion for a preliminary injunction against the official capacity requirements in their daily speeches, and I would also add that while we're all in different locations, there will be an official transcript of this hearing made and made available, and so personal recordings of this hearing are not official transcripts and should not be used by -- shouldn't be made. So, if you want a transcript of the hearing, that should be arranged through our court reporter. All right. Good morning.

Amanda, how are you today?

THE COURTROOM CLERK: Good morning, Judge. I'm good. I am hearing a lot of static, so anyone who is not speaking, please make sure that you mute your microphone.

THE COURT: I'm hearing it as well. Let's see how it goes, okay. Let's first have the parties announce themselves.

THE COURTROOM CLERK: Sure, I will call the case.

THE COURT: Thank you.

THE COURTROOM CLERK: The Court calls case 1:20-cv-731, National Association of Immigration Judges, Affiliated With The

International Federation of Professional and Technical Engineers versus James R. McHenry, III, for a motion hearing.

May I have the appearances, please, first for the plaintiff.

MR. GLASBERG: Good morning, Judge. Vic Glasberg for the plaintiff, and I'm accompanied by Ramya Krishnan, who will make the argument, and also Alex Abdo and Stephanie Krent, co-counsel, are present on the line.

THE COURT: All right. Good morning. And for the director?

MS. YANG: Good morning, Your Honor. This is Catherine Yang from the U.S. Attorney's Office. With me today are Kevin Hancock, Christopher Hall and Greg Doe from the Department of Justice, Federal Programs Branch. Mr. Hancock will be arguing today.

MR. HANCOCK: Good morning, Your Honor.

THE COURT: Well, I had a chance to go through the pleadings and what I believe to be the important cases, and I'll hear whatever you would like to say this morning within time limits, but I'm particularly interested in the jurisdictional argument and, as I read the Supreme Court and the Fourth Circuit cases, and in particular the *Elgin versus Department of Treasury* and the *Bennett versus U.S. Securities and Exchange Commission*, and I think the *AFGE* case out of the D.C. Circuit is consistent. They have come down pretty strongly on the side of finding that a

facial challenge to the constitutionality of prior restraint are required to go through agency review prior to Court of Appeals review, and each of the cases then goes through the *Thunder Basin* test, although I'm not sure the *Elgin* case isn't broad enough to preclude it as well.

So I'm not sure that anything prior to 2012 when *Elgin* came out is really case law that has been cited by the other cases. I'm also interested in the second prong of the wholly collateral test in *Thunder Basin* and the argument there.

I'm also interested in the government having identified a pathway for immigration judges to follow to get review administratively and then at the Fourth Circuit and whether that exists today.

And I guess, finally, why there hasn't been an "as applied" pursued versus the facial challenge. So those are some of my concerns and focuses, and, Ms. Krishnan, if you want to begin, go ahead.

MS. KRISHNAN: Thank you, Your Honor. This case is about whether the government can prevent immigration judges from speaking publicly in their private capacities about the system they are called to administer. In a policy issued in 2017 and modified in January of this year, the government categorically prohibits judges from speaking publicly in their private capacities about immigration law rules and policy issues or the agency that employs them. On all other topics judges are

required to submit to an onerous pre-approval process. The policy is an unconstitutional prior restraint in violation of the First Amendment. It is also unconstitutionally vague under the Fifth Amendment. NAIJ now seeks a preliminary injunction against the enforcement of the policy.

I will address three issues today. First, why this Court has jurisdiction; why NAIJ is likely to succeed on the merits of its First and Fifth Amendment claims; and, finally, why the union satisfies the balance of the preliminary injunction factors.

So, coming first to the question of jurisdiction, the government argues that this Court's jurisdiction is precluded by two statutes, which, for simplicity, I will refer to as the Labor-Management Statute and the Civil Service Statute. And I'll address the *AFGE* case that the government primarily relies on in a minute, but if I could start with the Supreme Court's decision in *NTEU* and the D.C. Circuit's case in *Weaver*, which we think bear strongly on this case.

If the government's theory were right, the Supreme Court's seminal decision in *NTEU* would be wrongly decided. That case was in a similar posture to this one. Two federal unions and several individual federal employees filed suit in District Court challenging the constitutionality of employee speech restrictions. The Court invalidated those restrictions without so much as mentioning jurisdiction.

In *Weaver*, the D.C. Circuit addressed jurisdiction, but it

expressly rejected an argument similar to the one the government makes here. In that case, an employee challenged an agency policy on First Amendment grounds arguing, like the union does here, that the policy was an unconstitutional prior restraint.

Unlike this case, however, the plaintiff also challenged a specific application of the policy, an admonishment she received for not complying with the policy. The Court dismissed the admonishment claim because it was remediable through the civil statute, but it refused to dismiss the constitutional claim because it was a simple pre-enforcement attack on the validity of an employee speech policy, and it stood independently of the admonishments. In doing so, the Court relied on *NTEU* and *Sanjoura*, another employee speech case from the D.C. Circuit in which the Court declined to address jurisdiction.

We argue that these cases clearly establish that the union's claims here are not precluded by either the Labor-Management Statute or the Civil Service Statute.

Addressing squarely the *AFGE* case, the recent D.C. Circuit decision which the government relies on, the Court held that the critical question in determining whether a claim is wholly collateral to a statutory scheme is whether it is of the type that is regularly adjudicated through the statutory scheme and whether the relief the plaintiff seeks is of the type that is routinely granted under the statute. The Court took that test from the Supreme Court's decision in *Elgin*, and in *AFGE* the Court

answered that question in the affirmative because the union raised broad statutory claims under the Labor-Management Statute. And although the union also raised constitutional claims, the Court held that the union could obtain the same relief before the Federal Labor Relations Authority. This case is entirely distinguishable. NAIJ does not make any statutory claims, and the relief it seeks, a permanent injunction against the agency's enforcement of the policy, is not of the kind that is routinely granted under the Labor-Management Statute. The claim is also similarly collateral under the Civil Service Statute because, unlike in *Weaver*, there is no personnel action within the meaning of the statute. Personnel action, as we explained in our reply brief, is an individual personnel decision, and here NAIJ does not challenge any such decision. So, for that reason, the government can't satisfy the second step in *Thunder Basin* which asks the Court to consider whether the claim is of the type that Congress intended to be reviewed through the scheme, because here NAIJ's purely constitutional claims are wholly collateral to the scheme.

Would Your Honor like me to address the other two factors in the *Thunder Basin* test or is that sufficient for now before I move on to the merits?

THE COURT: Ms. Krishnan, I don't need the argument on the other two prongs. I was focused on wholly collateral. So thank you. I apologize. Go ahead.

MS. KRISHNAN: Thank you, Your Honor. Well, turning, then, to our First Amendment claim, we argue that NAIJ is likely to succeed on its claim that the policy imposes an unconstitutional prior restraint on the protected speech of immigration judges. Your Honor is familiar with the test that applies from *NTEU*. Under that test, the government must show that the interests of employees and potential audiences in the restrained speech is outweighed by the expression's necessary impact on the operation -- on the actual operation of government.

The government also has to show that the harms it seeks to address are real and that the regulation will alleviate those harms in a direct and material way.

THE COURT: I'm sorry, let me interrupt. The government spends a great deal of time in their papers discussing the different issues that make their position that they knew that the more formal requirements for the official capacity designations and the fact that the pre-2013 [sic] mechanical -- pre-2013 [sic], I think the agencies, many of the agencies, not just here, but the immigration judges, allowed judges to speak or employees to speak in their personal capacity, although they allowed them to be speaking as -- in their position with the government, and that that, according to Mr. McHenry, caused confusion and so they changed the policy in 2013 [sic] and then modified it in 2017 and 2018 and, perhaps, 2020, but the point I'm trying to make is that, you know, we're dealing with employees, but here we're

dealing with immigration judges who are -- who take an oath to follow the Constitution, follow the laws that they have before them, and so that it's a very individual deliberation as to how far they should be allowed to write or speak in their official capacity. Do you disagree with that?

MS. KRISHNAN: So, no, we don't disagree with the proposition that there can be unique considerations at play when you're talking about judicial officers, but at the very minimum, under the test that falls under *NTEU*, what the government needs to show is that the policy is reasonably necessary to redress an actual harm, and here the government has failed to show any actual harm to its asserted interests in protecting the actual and perceived impartiality, and all judges -- and also in avoiding public confusion and disruption of the kind that would undermine confidence in the agency. So to --

THE COURT: How does a judge go about determining that in a situation like this one where requests are coming in from immigration judges for permission to speak or to write and are then, you know -- the EOIR and, I guess, the SET is responding to those inquiries. Without the abilities to substantively review the decisions that EOIR is making about those requests, how does the Court determine whether these restrictions are prior restraint under *NTEU*?

MS. KRISHNAN: So, the -- the Court itself in *NTEU* made very clear that a restriction on employee speech that constitutes

a prior restraint of the kind that is subject to the exacting scrutiny outlined in that case. It impedes a broad category of speech; that is, it chose potential speech before it happens, and so a number of Court of Appeals, including the Fourth Circuit, for example in *Liverman*, had held that not only, you know, outright prohibitions on personal capacity speech, but also pre-approval policies and requirements of the kind at issue here constitute prior restraints within the meaning of *NTEU*.

There's no question here that the *NTEU* test applies because here the policy not only prohibits judges from speaking in their personal capacities about immigration and EOIR-related topics, but it also requires judges to submit to this pre-approval process. And to the extent that the government asserts an interest in distinguishing between personal and official capacity speech because it says that, you know, absent such a process, judges engaging in personal capacity speech, when it is in reality official speech, could lead to public confusion, it needs to be able to show actual harm to its interest. You know, if pointing to an interest in distinguishing between personal and official capacity speech was sufficient, any agency could justify imposing a prior restraint on their employees' speech.

So, in the absence of any showing of concrete harm from judges deciding for themselves whether they're speaking in their personal capacities, there's no reason why these judges who are

charged with making life-altering decisions on a daily basis can't draw the line between personal and official capacity speech.

And, in fact, it appears from the policy that it's the government that can't appropriately draw this line because it has adopted this overbroad definition of official capacity speech that sweeps in, not only speech that ordinarily falls within the scope of their duties, which is the test set forth by the Supreme Court in *Lane*, but also speech that merely concerns those duties, and the Court in *Lane* was very clear that the distinction --

(Noise interference.)

MS. KRISHNAN: I'm sorry, Your Honor, my -- were you trying to say something, or I might have just not heard you.

THE COURT: No, it was static. I'm listening, and I've gone over the *Lane* case carefully, and it speaks volumes about your argument, but go ahead.

MS. KRISHNAN: Thank you. So, there's no doubt that the speech the immigration judges want to engage in falls on the personal capacity side of the distinction that the Supreme Court outlined in *Lane*, and that's consistent with the formal position description for immigration judges -- that the agency created itself, which can be found at Exhibit O to Judge Tabbaddor's supplementary declaration, but that description makes no mention of public speaking or writing outside of judges' adjudicating responsibilities, and that position is also consistent with the

agency's recent statements to immigration judges, a sample of which can be found at Exhibits H to K of Judge Tabaddor's initial declaration. In the e-mails exhibited, EOIR in denying judges' request to speak in their personal capacities about immigration laws and policies, repeatedly stated that such engagements are not an official responsibility of regular immigration judges and that they should, instead, be handled by agency management officials in order to ensure consistency in the agency's messaging. So here, NTEU applies, and the government can't satisfy it. And as Your Honor knows, the government does raise a variety of interests, including ensuring compliance with the ethics laws, meeting staffing needs, preserving confidence in the agency, and promoting judicial integrity, but, as we explained in our papers, none of those interests can sustain the policies. As an initial matter, as the agency has produced no evidence of real harm to any of the interests from judges engaging in personal capacity speech in the years prior to the 2017 policy, and this alone is fatal as the Fourth Circuit recognized in *Liverman*, but, in fact, the problem here is much bigger than lack of actual harm because the harm asserted seems to be a pretext for viewpoint discrimination.

The agency candidly admits that the policies were issued in response to increased public interest in immigration, and one of the declarants, Ms. Owen Cirse, in describing how she undertakes supervisory review, states that in evaluating personal

capacity requests, she considers whether an employee's participation would result in any negative publicity or scrutiny to the agency and to the federal government. That is precisely the kind of viewpoint discrimination that the First Amendment prohibits. But were that not a sufficient problem, as I noted, the policy isn't appropriately tailored to serve any of the agency's asserted interests.

In some instances, the policy seems redundant because there are preexisting policies and laws that achieve the agency's ends. For example, the government states the policy is necessary to ensure compliance with ethics laws, but it doesn't explain why the laws themselves aren't adequate to serve that end. The agency says the policy is necessary to ensure consistent staffing, but the agency already has a policy requiring immigration judges to request leave, and, unsurprisingly, that policy doesn't permit the agency to review the content of proposed speech.

And finally, the agency says that the policy is necessary to remind IJs of their duties of independence and impartiality, but judges are well-aware of this obligation, which is at the heart of what they do every day, and these duties are already imposed by federal regulation and the 2011 Ethics guide.

Finally, the government points to this interest in public confusion -- avoiding public confusion and disruption that undermines public confidence in the agency, but those interests

rely on a false premise that immigration judges are high-level policy making officials equivalent to an agency head. Immigration judges don't set policies for the agency. Their decisions are reviewable by the Board of Immigration Appeals, and they aren't even precedential, and their obligations of impartiality and independence also make it extremely unlikely that the public would assume that judges act as a mouthpiece for the agency.

And finally, even if the judges were policy-making officials, the policy fails because it doesn't fit the agency's interests. It applies indiscriminately to all speech, not just speech related to judges' duties, and the policy's review criteria fail to distinguish between speech that could reasonably be expected to be disruptive enough to undermine public confidence in the agency and speech that clearly would not.

The policy also fails for the additional reason that it lacks the safeguards ordinarily required of prior restraints. The government says that this lack of safeguards isn't relevant in the public employee speech context, but that is belied by the decisions of numerous courts of appeal, including the Fourth Circuit in *Marchetti*, which clearly states that the absence of substantive and procedural safeguards is an additional thumb on the employee's side of the scales in *NTEU* balancing.

And here the policy lacks two critical safeguards. It lacks narrow and objective standards. The policy's review

criteria provides that all speaking requests will be reviewed for consistency with agency policies and communications, and this standard seems to require immigration judges to tow the agency's official position in all personal capacity speech, which would plainly facilitate viewpoint- and content-based discrimination.

And finally, the policy lacks a definite time limit for review. The 2018 Memorandum of Understanding doesn't cure this deficiency because it includes aspirational time limits. Those time limits are only aspirational and they only cover some steps of the pre-approval process. The government also doesn't contend that those time limits are actually met in practice. The record establishes that they often are not met.

So, for all those reasons, NAIJ is likely to succeed on its claim that the policy is subject to *NTEU* scrutiny, but that it fails to meet it. Turning to the union's Fifth Amendment claim. In that case --

THE COURT: Yeah, I don't -- I understand your argument on the Fifth Amendment claim and I don't need further argument on that. Perhaps, if it's raised by the government, you can address it in your reply, but I think I understand well your argument there, Ms. Krishnan, and if you want to go to the irreparable harm, I'll hear you briefly on that.

MS. KRISHNAN: Thank you, Your Honor. On irreparable harm, the Fourth Circuit has held that plaintiffs demonstrate irreparable injury by establishing a likelihood of success on

their First Amendment claim, and here NAIJ has done that, but it also establishes irreparable injury independently. Here the record establishes that numerous judges would be denied approval to share their personal views on immigration laws and policy, and the policy now includes this outright prohibition on judges engaging in exactly that sort of speech. Conference organizers no longer invite immigration judges to speak to members of the public at their events because they believe it would be futile to do so, and the lack of clear deadlines and standards is resulting in arbitrary and delayed decisions. So, absent a preliminary injunction, immigration judges will continue to suffer irreparable harm from these injuries.

And finally, the public interest and balance of equities also weigh in NAIJ's favor. These factors, like irreparable harm, are established whenever there's a likely First Amendment violation, and here we have established that there is one. The government has no interest in enforcing a policy that is unconstitutional, and the public interest is clearly served by protecting First Amendment rights.

So, for those reasons, NAIJ satisfies the requirements for a preliminary injunction to be issued, and we respectfully request the Court to enter one.

THE COURT: All right. Thank you, Ms. Krishnan. All right. Does the government want to respond?

MR. HANCOCK: Yes. Good morning, Your Honor. This is

Kevin Hancock for the Executive Office For Immigration Review. The plaintiff's motion for a preliminary injunction should be denied because NAIJ has not demonstrated it will suffer irreparable harm, jurisdiction is lacking in this court, and their constitutional claims are unlikely to succeed on their merits.

Recognizing that the speech of its immigration judges can greatly affect the agency's overall mission, the EOIR has worked closely with the union to incrementally develop and to improve with policies governing the outside speaking and writing of its employees.

In 2011, the agency and the union jointly issued an Ethics Guide, and that guide specifies the workplace ethics and personnel law policies that would apply to immigration judges, and they also memorialize the preexisting requirement that immigration judges seek agency review of whether public speaking or writing engagements would comply with those laws.

Now, that Ethics Guide in 2011 did not specify a process, however, and so in 2017 the agency implemented a standardized process by which the agency would review such requests, and that is the policy now being challenged.

Your Honor, I will go directly to your concern about jurisdiction. As we've argued, the plaintiffs in this case, as the certified bargaining representative for most immigration judges, they only have one proper route to bring their challenge

to the policy, and that is through the scheme of the Federal Service Labor Management Relations Statute, which I'll refer to as "the statute." Through that scheme, they can bring their dispute with the policy to the Federal Labor Relations Authority, which could hear that dispute, and then the Fourth Circuit would thereafter have jurisdiction over that claim, but this is the exclusive path that Congress has determined must be followed in order for remedies to be exhausted before resorting to Article III review. Instead, the plaintiffs have rushed right to the District Court despite the fact that the --

THE COURT: I'm sorry, is that avenue of review still available to NAIJ now? Are there time limits on when that action could be brought?

MR. HANCOCK: Your Honor, I'm not aware of any expired time limit. If that were the case, I think it would only serve to highlight the delay that plaintiff has had in bringing this dispute. The policy is now three years old. It was first issued in 2017. Even if the Court were to accept plaintiffs' claim that the policy actually was only issued with the 2020 Memorandum, that occurred in January, and so it's now been six months since that time, and plaintiffs have no explanation for why they have not sought the emergency relief they claim to need in this motion earlier, rather than delaying it for that time. But I am not aware of a time bar on that, and the union has previously demonstrated that it could resort to the dispute mechanisms of

their CBA with the agency in order to handle grievances over this particular policy. They did just that in 2018. After the 2017 memo was issued, the union had some issues with that Memorandum, invoked collective bargaining, and those issues were resolved, and it resulted in a Memorandum of Understanding in 2018 that resolved those issues.

Plaintiffs could have done the same thing here and resorted to the CBA's grievance procedures that could have gone to arbitration and, thereafter, the FLRA would have had the ability to hear that dispute with subsequent Fourth Circuit review.

The *Thunder Basin* factors could all be -- are all satisfied here and do not pose any impediment to the claim at issue in this case being brought or being channeled pursuant to the statute.

The plaintiffs cite the fact that this is a pre-enforcement challenge, but the courts have repeatedly held that a pre-enforcement challenge doesn't prevent or excuse a plaintiff from resorting to the statute's channeling. *Thunder Basin* itself was a pre-enforcement challenge. The same for the *AFGE* versus Trumpcare, and as the *AFGE* case highlighted, *Thunder Basin* said that there's no entitlement to bring a pre-enforcement claim when the provisions of the Federal Service Labor Management Relations Statute apply, as they do here.

The plaintiffs primarily rely upon *NTEU* and the *Weaver*

case. As Your Honor highlighted, the *Elgin* case is a particularly seminal case in this area. That case dates from 2012. The *NTEU* and the *Weaver* decisions both predate the *Elgin* ruling. It doesn't appear that the Supreme Court in NTEU -- it did not even address or consider this issue, and there's no indication that the issue of channeling under the statute was ever raised in that case, and so it should not overcome later, more relevant precedent like *Elgin* or the *AFGE* ruling.

And the reason for that is that if a plaintiff could just circumvent the channeling requirement of the statute just by bringing up a pre-enforcement claim instead of an after-the-fact post-hoc enforcement claim, they could circumvent the statute almost at will, and I believe the *AFGE* ruling made that point as well.

The fact that this claim involves a constitutional challenge also does not excuse plaintiff from not resorting to the statute channelling requirements. Many of the cases that were just discussed involved constitutional claims. The *Elgin* case involved the constitutional claim. *AFGE* involved constitutional claims, and, nevertheless, those courts held that that channelling and exhaustion under the statute was required.

Your Honor, to your concern about the wholly collateral prong, I think that is concerned, and so relief -- the union could receive the relief it seeks, even if it follows the mandatory procedures of the statute. The Supreme Court in *Elgin*

stated that an appellate court reviewing an FLRA decision can consider constitutional law issues raised by the plaintiff, even if the FLRA itself said it could not. And so, even if that authority said, you know, we're not going to decide the constitutional claim, the Fourth Circuit would still have jurisdiction to do so, and the *AFGE* case also reinforced that principle.

So, there are no relevant roadblocks here to plaintiff's ability, indeed mandatory duty, to exhaust under the Federal Service Labor Management Relations Statute.

Your Honor, some of the issues that are raised here also highlight the lack of irreparable harm in this case. Plaintiffs almost exclusively rely upon their claim that there's a valid First Amendment claim here. We'll address that, but other factors should also be considered. The union was very involved in the development of this very policy, and that undermines any claims of urgency they may have in needing emergency relief. Again, they jointly issued that 2011 Ethics Guide with the agency, and they authored the application of the 2017 Memorandum to immigration judges with their collective bargaining and agreement with the agency in 2018 on that Memorandum of Understanding.

The delay I just mentioned also undermines any claim of urgency. There is a court that has held that time delays of less than six months have also undermined claims for injunction to

hear, at a minimum, the delay was six months, if not three years since 2017.

And finally, Your Honor, there's no demonstrated harm to plaintiff arising from this policy. The policy is a process. It is a process for implementing a pre-existing requirement that requires immigration judges to seek approval for outside speaking and writing. That pre-approval requirement exists independently in that 2011 Ethics Guide, and so to the extent they argue chill from those requirements, that really exists in an independent document that's not challenged here.

The ethics rules and personnel rules that apply to outside speaking and writing, they all exist in the policy process as well.

And finally, I want to directly address the allegation that a policy is a prohibition on the ability of immigration judges to speak about immigration issues and about the EOIR. To the contrary, that's not the case.

So, immigration judges are still permitted to speak about immigration topics and about the agency, but subject to the applicable ethics and personnel rules and policies that have always applied to their outside speaking. What the policy did was it recognized the reality that when an immigration judge speaks publicly about immigration topics and about the agency and about core issues that are relevant to the mission of this agency, they do so in an official capacity as representatives of

that agency regardless of the label they would subjectively apply to that speech, and that recognition in the policy in 2017 brought EOIR's practice in line with the Supreme Court caselaw on this topic. Simply because the agency has previously allowed immigration judges to say they were speaking in a personal capacity about the topics that are central to the agency's mission, while using their official titles, doesn't mean the First Amendment requires that result. And so what the policy did was it recognizes that reality, that really that type of speech on behalf of the agency is truly official capacity speech, and the agency's interests in what is said on its behalf are greatly heightened. It doesn't actually prevent any speech, though, because when an immigration judge submits a personal capacity request to the agency, if that's denied because the agency says, Well, we think this is actually official capacity because you're speaking about the very things you do in your job, that request could be resubmitted to the agency as an official capacity request, and so the process here is not just an outright, you know, suppression of speech like plaintiffs want to cast it as, and the agency's interests in ensuring the accuracy and consistency of speech that is publicly made on its behalf are great, and the *Garsetti* line of cases has, you know, gone as far as to say that the First Amendment extends no protection to speech that is made pursuant to an executive, personnel -- pursuant to their official duties, and such speech rightfully

includes an immigration speech about immigration topics and the functioning of the agency for which they work.

The Fourth Circuit and the Supreme Court have both said that the test for whether someone is speaking pursuant to their job duties is a practical inquiry. It's not a formal one, it's a practical one. You look into what the employee's daily professional activities actually are. And plaintiff cites to the fact that the formal job description for immigration judges doesn't explicitly include speaking publicly on behalf of the agency, but that's not the test under the Fourth Circuit and Supreme Court case law. Specifically, I would point the Court to the *Crouse* decision in the Fourth Circuit.

On the contrary, speaking publicly to educate the public about the immigration courts and the role they play in society, has been acknowledged by the union itself as, quote-unquote, "part of the job."

Now, in their reply they say, well, they weren't speaking about the official duties, but again, under the practical flexible test for what that is, the fact that immigration judges have a, quote-unquote, "widespread belief" that engaging in such speech is important is an indication itself that it is an understood part of their job duties. You know, many invitations for speaking are extended to immigration judges due to the very fact that they are immigration judges. The use of their title lends a sense of officialness, an imprimatur of officialness to

an event that is addressing immigration issues. Having an immigration judge there, you know, they are being invited for that very reason, because it is part of their job.

Your Honor, to the extent that the policy applies to speech in an immigration judge's private capacity, genuinely private capacity, the Supreme Court has also said that the government has great leeway to regulate pursuant to its interests because, again, this is a context in which the government is acting as an employer, not acting as a sovereign regulating the general public. And so, on the one hand there are very minimal burdens placed by this policy on private capacity speech of immigration judges.

The universe of speech at issue here is pretty small. The statistics show that in three years there have been 59 approvals and 16 denials of personal capacity speaking requests.

You know, personal capacity requests are pretty routinely granted. The agency has said, as long as they're personal capacity and there are no ethics issues and no work conflicts, we'll grant the requests, and the fact that only 16 denials have occurred for personal capacity requests during that three-year period, I think, illustrates that point.

The timelines provided are relatively short, and just a couple of examples that plaintiffs point to, I don't think, disprove that. There have been, you know, hundreds of requests. Two examples of, you know, perhaps some tardiness don't kind of

condemn the entire regime, and the policy furthers the agency's interests. So, without the policy, it would be operationally difficult, if not impossible, to provide appropriate assistance and advice to immigration judges and other EOIR personnel regarding compliance on ethics, personnel laws, and policies. You would have a greater risk of inconsistent treatment, a greater likelihood of ethics violations, violations of professionalism rules. You would have a greater number of issues with the operations of the Court being disrupted. That interest is particularly important now, given that there are approximately 1.2 million cases pending before the immigration courts, a workload that more than doubles that which existed before 2017.

And, you know, the agency has an interest, especially when it comes to official capacity speech, to ensure the accuracy and consistency of what is being said on behalf of the agency. These interests on behalf of the agency are heightened when it comes to personnel who are high-level policy-making and public-facing officials.

The Fourth Circuit in *McVey* is very clear about this. If an official is policy-making or public-facing, the government's interests are at their apex, and that is true of immigration judges in this case. Plaintiffs don't dispute that immigration judges are public-facing officials. They are appointed by the Attorney General. They are paid according to a higher standard. Their rulings can, indeed, set policy. In the case where the

Board of Immigration Appeals affirms that opinion, the ruling of an immigration judge, that sets agency policy. And, again, they have, you know, admitted that public speaking is a part of the job. Even if not officially, they view it as a very important aspect of what they do. So, these are high-level employees, and the agency has a very strong interest in what is said on behalf of the agency.

The tailoring of the policy is appropriate. The sweep need only be reasonably necessary to protect the agency's interests. Plaintiffs raise a number of lesser restrictive means that they claim would further the interests of the so-called intermediate steps that they point to, but the test here is not whether a lesser restrictive means exists, it's whether the means chosen by the agency would be reasonable under the circumstances, and that is true here.

Your Honor, in our view, the Fifth Amendment claim is also unlikely to succeed. Unless Your Honor has any specific questions on that, I will move on to the balance of the equities.

THE COURT: Yeah. I don't have any questions --

MR. HANCOCK: -- sorry --

THE COURT: -- on the Fifth Amendment, so please move on to your closing remarks.

MR. HANCOCK: The public interest in the effective operations of the nation's immigration courts is significant, particularly at this time, and in our view that interest weighs

strongly against the injunction here, particularly when the union has failed to demonstrate any harm that arises from the process implemented by this policy. So we would respectfully request that the Court deny the injunction. Thank you, Your Honor.

THE COURT: Thank you, Mr. Hancock. Ms. Krishnan, do you want to respond?

MS. KRISHNAN: Thank you, Your Honor. If I could take a few minutes to respond to some of the issues raised.

THE COURT: Yes, go ahead.

MS. KRISHNAN: I would like to first address the issue of jurisdiction. The government argues that NAIJ's constitutional claims satisfy the second step of *Thunder Basin* because here they assured meaningful judicial review of their claims under the Labor-Management Statute, but the government has still refused to identify any claim that NAIJ could raise through the administrative review process to get to this meaningful judicial review of the claims that it raises here.

Here the union challenges the existence of a policy, not its negotiability or any particular application of it, and this harm simply isn't cognizable under the Labor-Management Statute. That statute puts in place a complicated scheme, but the only real opportunity for judicial review here is if the union could recast its claim as an unfair labor practice. An unfair labor practice usually involves, you know, a failure to bargain over a certain subject or to negotiate in good faith or a failure to

otherwise comply with the Labor-Management Statute, and here NAIJ doesn't argue that the agency has violated the statute in any way. Its claim isn't over the agency's failure to bargain over the policy but over the policy's very existence, and the government hasn't actually articulated any theory for how the union could seek meaningful judicial review of this claim, and that's because there isn't any.

The government argues that the union could have used the grievance and arbitration procedures under the collective bargaining agreement, but under the Labor-Management Statute, a grievance that goes through those procedures is only reviewable if it involves an unfair labor practice, and for the reasons that I've already explained, the union couldn't recast its challenge here as an unfair labor practice.

The D.C. Circuit has also held that grievance procedures are not an appropriate forum for resolving constitutional claims, and I point the Court to the Court's decision in *Andrade v. Lauer* at 729 F.3d 1475 for that proposition.

So, here there is no assurance that NAIJ could get meaningful judicial review of its claims were it to go through the administrative review process provided in the Labor-Management Statute, and even if the union could get judicial review, it still wouldn't be meaningful for two reasons. First, the Supreme Court made clear in its decision in *Free Enterprise* that a plaintiff shouldn't have to concoct a dispute

under a statutory scheme in order to raise a simple pre-enforcement challenge. And second, as the Fourth Circuit made clear in *Bennett*, review isn't meaningful if plaintiffs will be forced to suffer irreparable harm as a result of having to go through the administrative review process. And here, NAIJ's members would suffer irreparable harm in the form of the ongoing violation of their First Amendment rights.

Finally, the government argued that the fact that we bring a pre-enforcement challenge here is not dispositive, and they mentioned a number of cases that involved constitutional claims where the plaintiff was required to go through the administrative review process, but none of those cases are apposite. They either involved statutory claims, as in *AFGE*, or else they involved an administrative action that was taken pursuant to the statute or regulation that was said to be unconstitutional, as in *Elgin*, or else they involved an intent by the plaintiff to preempt an administrative action that was about to happen, as in *Thunder Basin*, so none of those cases are apposite. And the government has not been able to find a single case involving simple pre-enforcement attack to an employee speech policy of the kind raised here, and the cases that are directly on point all suggest that these are not claims that should be routed through the Labor-Management Statute or the other statute relied on by the government.

If I could quickly address the irreparable harm and

redressability. On irreparable harm, the government argues that there is no harm because the Ethics Guide was jointly issued by NAIJ and the union. First of all, the Ethics Guide is not at all before the Court. That Guide is superseded by the 2017 and 2020 policies because the Guide clearly states that, to the extent that there are other EOIR policies on an issue, those policies, rather than the Guide, controls. Secondly, the government argues that, you know, the union agreed to the 2017 policies, so there can be no harm, but I want to be very clear here. NAIJ did not agree to the 2017 policy. While it tried to negotiate after the policy was issued to mitigate its problems, these negotiations focused on the policy's implementation, not the policy itself. And then this year the agency made the policy even more restrictive. So, in this lawsuit, what NAIJ objects to is, again, the policy's very existence; not any specific issue related to its implementation. And for the reasons -- as I mentioned before, there's no question that they suffered irreparable harm from the policy's prohibition on a broad swath of their personal capacity speech and also the onerous pre-approval process. There's also no delay, substantial delay in bringing this challenge here. You know, the 2020 policy made a significant revision to the agency's pre-existing policy on speaking engagements, and the union has filed suit many months after that significant change in policy. There's no delay here, and, even if there were, there are numerous courts that have held

that the concerns over delay are overcome when there is a significant infringement of First Amendment rights, and here there is that infringement.

The last point I wanted to address was redressability. The government argues that the union's injuries are not redressable because, even if the Court were to issue a preliminary injunction against the 2017 and 2020 policies, that the pre-approval requirements in the Ethics Guide would still be in place, but here the injuries are attributable solely to the policies for the reasons that I mentioned; that is, that here the pre-existing pre-approval requirement in the Guide has been superseded.

But it's also well-settled that to establish redressability, you don't need to show a favorable decision would relieve every injury, and here the policy caused several injuries independent of the Guide.

As an initial matter, the policy, unlike the Guide, imposes this outright prohibition on judges who speak publicly in their personal capacities about immigration and EOIR-related topics, and it also enacts a far more onerous pre-approval process. So here, under the policy, judges have to submit any speaking engagement and any contact with the press, whereas the Guide's requirement only requires submission of written works and speeches, and here the process involves four layers of review, not merely the supervisory approval that was required under the

guide. So, there are several injuries independent of -- I'm sorry. There are several injuries that the policies impose independent of the Guide, and for those reasons NAIJ has established redressability here.

THE COURT: All right. Well, thank you, Ms. Krishnan, and thank you, Mr. Hancock, for the arguments. Both of you responded to the questions that I have, and I appreciate very much the briefing that was done. It was very thorough. And we've, as I've said, we've been looking at it, and we will continue to look at it. We'll try and get you something out next week. I don't promise it, but I think we'll be able to do that. And, you know, it is a significant issue and one that I think the immigration judges have properly brought before the Court, their concerns, and I'm, you know, I'm not involved in the bargaining power between the EOIR and the NAIJ, and certainly there has been a history of negotiations, and regardless of how this lawsuit turns out, I would hope that those conversations, whether under the CBA or under other provisions in existence, that the parties will continue to address this very important issue moving forward and in a more informal context, if necessary. But we will get you out a decision as soon as we can and, again, I appreciate the arguments of counsel today, and I hope you all have a good weekend and stay safe. Thank you, all.

(Proceedings adjourned at 11:00 a.m.)

C E R T I F I C A T E

I, Scott L. Wallace, RDR-CRR, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/ Scott L. Wallace — 8/14/20

Scott L. Wallace, RDR, CRR
Official Court Reporter

Date